Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-437

PEPSI COLA BOTTLING CO. OF PENNSAUKEN,
Petitioner,

v.

INEZ V. LOWENSTEIN, Individually, and A. MOORE LIFTER, JEROME L. MARKOVITZ, SUSAN L. CHACE, JANE B. LOWENSTEIN and INEZ V. LOWENSTEIN, Co-Executors of the Estate of EMMANUEL D. LOWENSTEIN, Successors in Interest to BBCI, INC., Successor in Interest to BOOTH BOTTLING CO., INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutory Provisions and Rules Involved	4
Statement of the Case	6
Reasons for Granting the Writ	9
Conclusion	12
Appendix A (Opinion of the Court of Appeals for the Third Circuit)	A1
Appendix B (Order of the Court of Appeals for the Third Circuit Denying Petition for Rehearing)	A14
Appendix C (Opinion of the United States District Court for the Eastern District of Pennsylvania)	A16

TABLE OF CITATIONS.

Cases: Page

Foman v. Davis, 371 U. S. 178 (1963) 11
Hanna v. Plumer, 380 U. S. 460 (1965) 10
Jack Cole Co. v. Hudson, 409 F. 2d 188 (5th Cir. 1969) 10
Johnson v. N. Y., N. H. & Hart. Ry. Co., 344 U. S. 48 (1952) .. 9
Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F. 2d 572 (7th Cir. 1976) 10
Roberts v. Pierce, 398 F. 2d 954 (5th Cir. 1968) 11

Statutes and Rules:

15 U. S. C. § 15 6
28 U. S. C. § 1254(1) 2
28 U. S. C. § 1332 6
28 U. S. C. § 2111 ..... 4, 9, 11
F. R. Civ. P. 50 ..... 3, 4, 5, 8, 9, 11
F. R. Civ. P. 61 ..... 5, 9, 11

Miscellaneous:

5A Moore's Fed. Prac., ¶ 50.02[3], p. 2331 9
5A Moore's Fed. Prac. ¶ 50.08, pp. 2358-59 9
9 Wright & Miller, Federal Practice and Procedure, § 2637, pp. 596-597 (1971) 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

Petitioner Pepsi Cola Bottling Co. of Pennsauken respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 21, 1976. Petitioner's petition for a rehearing was denied by Order dated June 28, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals is unofficially reported in 1976-1 CCH Trade Cases ¶ 60,904 and is printed in Appendix A. The order of the Court of Appeals denying the petition for rehearing is printed in Appendix B. The opinion of the District Court for the Eastern District of Pennsylvania is reported at 393 F. Supp. 299 (E. D. Pa. 1975) and is printed in Appendix C.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 21, 1976. A timely petition for rehearing en banc was denied by order entered June 28, 1976, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The question which forms the basis for the instant petition is—

> Is there not a proper predicate for the granting of a judgment N. O. V. under Fed. R. Civ. P. 50(b) where, at the end of plaintiff's case, defendant files and argues a detailed motion for a directed verdict and, at the close of all the evidence, defendant expressly and in writing requests the court to decide all issues for defendant as a matter of law and to direct the jury to find in defendant's favor?

If the petition is granted, petitioner will also seek to raise the following question:

> Where the Court of Appeals held that the trial court's entry of a judgment N. O. V. would be proper if the trial court had treated defendant's request for binding instructions as the substantial equivalent of a renewal of defendant's motion for directed verdict made after the close of plaintiff's case, did not the Court of Appeals err in failing to remand to the district court for determination of that issue, rather than concluding as a matter of law that the trial court did not so treat defendant's request?

STATUTORY PROVISIONS AND RULES INVOLVED.

28 U. S. C. § 2111.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Fed. R. Civ. P. 50.

(a) *Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after the entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for

judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Fed. R. Civ. P. 61.

. . . The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF CASE.

After a jury verdict against Petitioner in the amount of $1,414,750, on breach of contract and antitrust claims,[1] the trial judge granted Petitioner's motion for a judgment N. O. V. That judgment was reversed by a 2-1 decision of the Court of Appeals which held, after having raised the issue *sua sponte*, that Petitioner had not effectively moved for a directed verdict at the close of all of the evidence and, therefore, should not have been granted a judgment N. O. V.

At trial, at the close of plaintiff's case, defendant had filed a written motion for a directed verdict explicated by a 46-page oral argument. After presentation of all the evidence, defendant presented to the trial judge nine different written submissions requesting that the court decide all issues as a matter of law or direct the jury to find for the defendants,[2] which singly and in combination constituted

[1] Jurisdiction in the district court with respect to the antitrust claims was based on 15 U. S. C. § 15, and, as to the contract claim, diversity of citizenship. 28 U. S. C. §1332.

[2] 1. "You are directed to enter a verdict in favor of defendants." (Defendants' first Requested Point for Charge).

2. "I direct you to find that Booth had not sustained its burden to prove by a preponderance of the evidence that either defendant or both conspired with each other or anyone else to violate the Sherman Act." (Defendants' Third Requested Point for Charge).

3. "I charge you that the termination of the subfranchise by Pepsi of Pennsauken was strictly in accordance with the terms of the subfranchise and as a matter of law was lawful." (Defendants' Ninth Requested Point for Charge).

4. "Plaintiff has failed to introduce any evidence, either direct or circumstantial, to sustain its burden to prove by a preponderance of the evidence that either defendant was a party to any conspiracy at any time . . . However, if the Court intends to permit the jury to find a conspiracy, then defendants request that the

a renewal of the motion for directed verdict previously filed.

2. (Cont'd.)
Court instruct the jury as set forth herein." (Footnote #1 in Defendants' Requested Points for Charge).

5. "There has been no evidence from which reasonable jurors could find that plaintiff suffered any damages as a result of any alleged unlawful conduct of either defendant . . . However, if the Court intends to charge on damages, defendants request the following charge." (Footnote #7 in Defendants' Requested Points for Charge).

6. "We hereby request that the Court charge the jury that the termination was lawful and pursuant to the terms of the subfranchise agreement and that therefore any refusal by Pepsi of Pennsauken to sell concentrate to plaintiff was proper. However, if the Court does not charge the jury that the termination was lawful and pursuant to the terms of the subfranchise agreement, then the defendants submit the charge which follows in the above text." (Footnote #5 in Defendants' Requested Points for Charge).

7. "The issue of improper termination of the subfranchise agreement is for the Court to determine from construction of the documents. The documents clearly permitted Pennsauken to repurchase the subfranchise and, thus, there is no improper termination issue for the jury." (Footnote #1, in Defendants' Requested Points for Charge, explaining to the Court why there was no requested charge in respect of the contract).

8. "Interpretation of the provisions of the subfranchise agreement is for the Court, not the jury. As a matter of law, it is clear that Pennsauken had the right to repurchase the subfranchise. Thus there is no proper contract termination issue to be submitted to the jury." (Paragraphs 50-54, in Defendants' Objections to Plaintiff's Additional Requests for Points for Charge).

9. On the evidence presented, reasonable jurors could not find that plaintiff has suffered any damages whatsoever from any unlawful conduct of the defendants. If, however, the Court intends to charge the jury on damages, the proper damage charge in a civil antitrust case is set forth in *Gorham*." (Paragraphs 41-49, in Defendants' Objection to Plaintiff's Additional Request for Points for Charge).

At no time, either in the trial court or in its appeal briefs did plaintiff claim that Petitioner had not sufficiently renewed its Motion for a Directed Verdict such that a judgment N. O. V. could not be entered. Rather, as noted, the issue of defendant's compliance with Rule 50(b) was raised *sua sponte* by the Court of Appeals.

The Court of Appeals held that the request for binding instructions was not a sufficient predicate for the trial court's granting of a judgment N. O. V. and, although recognizing that a trial court could treat such a request as the substantial equivalent of a renewal of the earlier directed verdict motion, it held, as a matter of law, that the trial court did not do so in this case. The only evidence in the record on this issue, one way or the other, was the following colloquy over the requested points for charge (in particular, plaintiff's request with respect to a particular item of damage).

COUNSEL FOR PLAINTIFF (MR. FLOWERS): If the Court later decides that wasn't a proper element of damages, you can cut it out very easily.

THE COURT: We still have N. O. V.

COUNSEL FOR PETITIONER (MR. MANN): I realize that. I hope we don't get to that.

REASONS FOR GRANTING THE WRIT.

The nine submissions above set forth clearly constituted a renewal of the Rule 50(b) motion made, and extensively argued, at the close of plaintiff's testimony. Every one of them was made at the close of all the evidence, as required by Rule 50(b), and several days before the case was submitted to the jury. A directed verdict is "a means of removing a case from the province of the jury." Moore's Fed. Prac., ¶ 50.02[3], p. 2331. The very first such written submission, that the jury be "directed to enter a verdict in favor of defendants," clearly was a request that the verdict be directed by the Court and taken away from the jury. The eight other written submissions, in a variety of clear and unambiguous ways, constituted requests that the whole case and each of its constituent parts be decided by the trial judge, not the jury. As such, the nine requests clearly constituted effective renewal of the detailed Motion previously made and extensively argued. Plaintiff was thus afforded the precise procedural safeguards which any formal renewal of a motion for directed verdict might conceivably provide. 5A Moore's Federal Practice ¶ 50.08 at 2358-59 (1975). Nonetheless, the Court of Appeals determined as a matter of law that Petitioner's submissions did not provide a sufficient predicate for the later judgment N. O. V.

The decision of the Court of Appeals in this case conflicts with decisions of the Courts of Appeals for the Seventh and Fifth Circuits and, in ignoring the congressional mandate in 28 U. S. C. § 2111, and this Court's mandate in F. R. Civ. P. 61, creates uncertainty in the various federal jurisdictions in the application of F. R. Civ. P. 50(b).[3]

[3] Certiorari was granted on this ground in *Johnson v. N. Y., N. H. & Hart. Ry. Co.*, 344 U. S. 48 (1952). As Mr. Justice Frankfurter said, in his dissent on the merits, the Court had granted the Writ of Certiorari because:

In *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F. 2d 572 (7th Cir. 1976) decided on March 2, 1976, a few months prior to the Third Circuit's decision in the present case, the Court of Appeals for the Seventh Circuit said:

> Renewing the motion or moving for a directed verdict on the counterclaim which hinged upon the validity of Brookhaven's defense, would have been nothing more than a ritualistic mouthing and nugacious obeisance to the form, but not the spirit, of the rule. (532 F. 2d at 577).

Similarly in *Jack Cole Co. v. Hudson*, 409 F. 2d 188 (5th Cir. 1969) the Fifth Circuit held that even though movants failed to formally renew a motion for directed verdict, their simple oral request that "the jury be instructed to find for them" was a sufficient predicate for a judgment N. O. V. From this simple statement in the record the Court concluded:

> There can be no doubt that the trial judge was well aware of the reasons for the requested jury instruction, and, under the circumstances, we hold that this constitutes a sufficient predicate for the subsequent motion for judgment notwithstanding the ver-

3. (Cont'd.)
Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation. That is what is involved in this case. The immediate issue is the construction of one of the important Rules of Civil Procedure. That construction in turn depends upon our basic attitude toward those Rules—whether we take their force to lie in their very words, treating them as talismanic formulas, or whether we believe they are to be applied as rational instruments for doing justice between man and man in cases coming before the Federal courts. Our concern is with Rule 50(b) of the Federal Rules of Civil Procedure.
Id. at 55-56. See also *Hanna v. Plumer*, 380 U. S. 460, 463 (1965).

dict. *Roberts v. Pierce*, 398 F. 2d 954, 956 (5th Cir. 1968) 409 F. 2d at 191.

Thus, the Seventh and Fifth Circuits have heeded the congressional mandate to give judgment "without regard to errors or defects which do not affect the substantial rights of the parties, 28 U. S. C. § 2111, and the mandate of this Court to the same effect. F. R. Civ. P. 61. Until now the lower courts had implemented this joint mandate by taking "a liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment." 9 Wright & Miller, Federal Practice and Procedure, § 2637 at 596-597 (1971).

As stated in *Foman v. Davis*, 371 U. S. 178, 181 (1963),

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities.

But with the Third Circuit decision in the instant case, there is no uniformity in the application of that principle in the federal courts as it applies to Rule 50(b). Such diversity in the formalities required under Rule 50(b) can only become a trap for the unwary, particularly those attorneys who generally practice in federal courts outside the Third Circuit,[4] and cannot further any substantial rights of parties. As Judge Hunter recognized in his dissenting opinon in the instant case, refusal of the Court of Appeals to acknowledge Petitioner's requested jury instructions

[4] Counsel should be expected to be familiar with the published local rules of each court, but unless the Court grants certiorari in this matter, counsel will also have to be familiar with each circuit's particular application of nationwide rules of procedure.

as the effective renewal of its earlier motion for directed verdict, or at the very least to remand for the lower courts' specific determination on that issue, serves neither "the interest of justice or judicial efficiency."

CONCLUSION.

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1628; 76-1040

INEZ V. LOWENSTEIN, Individually, and A. MOORE LIFTER, JEROME L. MARKOVITZ, SUSAN L. CHACE, JANE B. LOWENSTEIN and INEZ V. LOWENSTEIN, co-executors of the Estate of EMMANUEL D. LOWENSTEIN*, Successors in interest to BBCI, INC., Successor in interest to BOOTH BOTTLING CO., INC.

v.

PEPSI COLA BOTTLING CO. OF PENNSAUKEN AND CANADA DRY DELAWARE VALLEY BOTTLING CO.

APPEAL FROM JUDGMENT N. O. V. OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA.

Before HUNTER, BIGGS and GARTH, *Circuit Judges.*

* A suggestion of transfer of interest upon the record has been made by White and Williams, attorneys for BBCI, as follows: "Inez V. Lowenstein, individually, and A. Moore Lifter, Jerome L. Markovitz, Susan L. Chace, Jane B. Lowenstein and Inez V. Lowenstein, co-executors of the Estate of Emanuel D. Lowenstein, the shareholders of BBCI, Inc., suggest upon the record, pursuant to Appellate Rule 43(b), the dissolution of BBCI, Inc. during the pendency of this action and the transfer of all corporate assets to them, equally." The transfer of interest is not contested.

OPINION OF THE COURT

BIGGS, Cir. J.: The complaint in this suit was filed by Booth Bottling Company, Inc. (Booth) on June 5, 1970.[1] After lengthy proceedings which need not be set out here, Pepsi-Cola Bottling Co. of Pennsauken (Pepsi) was found by a jury to have violated the Sherman Act, 15 U. S. C. § 1, and to have committed breach of contract. Substantial damages were awarded.

Pepsi [2] moved for a directed verdict on November 26, 1973, at the end of Booth's case. The motion was denied, and thereafter Pepsi presented its evidence. Neither the docket sheets nor the record indicate, however, that Pepsi made a motion for a directed verdict at the close of all the evidence. Pepsi concedes that it did not formally make such a motion.[3] On December 14, 1973, Pepsi did make three motions: for a new trial, for a judgment notwithstanding the verdict, and for alteration and amendment of the judgment. The District Judge granted judgment N. O. V. on April 28, 1975, under Fed. R. Civ. P. 50(b).[4] The motions for new trial and to alter and amend the judgment have not been ruled upon.

1. On January 28, 1976, Beverages International, Inc. and Crush International, Inc., two of the original defendants, moved to have their names deleted from the caption of this action. Since it appears from the record that, on November 5, 1973, plaintiff's motion for voluntary dismissal as to these parties was granted with prejudice, we see no reason to deny the motion to delete.

2. Pepsi was joined in this motion by the other defendant still in the case, Canada Dry Delaware Valley Bottling Company. The jury's finding of no liability as to the latter is not contested here. Subsequent discussion will make no reference to Canada Dry.

3. As to the contract-breach count, on November 29, 1973, in chambers Pepsi orally moved that the jury be instructed that Pepsi had the right as a matter of law to terminate the contract. The Court stated in reply: "I think I shall have to rule on your Points for Charge before you start your summation." Tr. 17-6, App. 1069. Pepsi argues that this motion and its points for charge also can be construed as, in effect, a motion for directed verdict. See discussion *infra*.

4. Rule 50(b) provides: "*Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, *a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside* and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (emphasis supplied).

The issue presented is whether the judgment N. O. V. is valid because of the absence of a motion by Pepsi for directed verdict at the close of all evidence. This question was noted by this Court before the argument and briefs on this specific point were requested and filed by the parties. The issue was also argued in open court. We conclude that the judgment N. O. V. is not valid for the reasons stated hereinafter.

Rule 50(b) requires that, as one predicate to judgment N. O. V., a motion for a directed verdict be made after presentation of all the evidence. It is clear from the record that this prerequisite for a judgment N. O. V. was not fulfilled. In *Beebe v. Highland Tank and Manufacturing Company*, 373 F. 2d 886 (3d Cir. 1967), cert. denied *sub nom., National Molasses Co. v. Beebe, Administrator*, 388 U. S. 911 (1967), the defendant moved for a directed verdict at the conclusion of the plaintiff's case. The motion was denied and thereafter the defendant presented its evidence. The case was then submitted to the jury, which

returned a verdict for the plaintiff. The defendant then moved for judgment N. O. V. The District Court denied the motion because of failure to comply with Rule 50(b). This Court affirmed, stating: "We agree that the appellant's failure to comply with Rule 50 precluded the granting of judgment in its favor notwithstanding the verdict against it. The record shows that at the close of all the evidence the appellant failed to renew motions it had made at earlier stages of the litigation for a directed verdict. And judicial power exists under Rule 50(b) to grant judgment notwithstanding the verdict only when a motion for a directed verdict has been made at the conclusion of all the evidence and, in legal contemplation, the questions thus raised have been reserved for subsequent determination. We have repeatedly held, very recently in *Gebhardt v. Wilson Freight Forwarding Co.*, 3d Cir., 1965, 348 F. 2d 129, 132 'that the introduction of evidence after the denial of a motion for a directed verdict constitutes a waiver of the error, if any, in the denial unless the motion is renewed at the close of all of the evidence'. We adhere to that ruling." 373 F. 2d at 888.

Moore sets forth the rationale for requiring a motion for directed verdict at the conclusion of all evidence as follows: 'To ask the court to enter a judgment, contrary to a general verdict of the jury where no motion for a directed verdict has been interposed, is simply to ask the court to re-examine the facts already tried by the jury, and this the court may not do without violating the Seventh Amendment.' [*quoting, Mutual Ben. Health & Accident Ass'n v. Thomas,* 123 F. 2d 353, 355 (8th Cir. 1941)].

"There is a better reason for establishing the motion for directed verdict as a condition precedent to a motion for judgment n. o. v. This is to avoid making a trap of the latter motion. At the time that a motion for directed verdict is permitted, it remains possible for the party against

whom the motion is directed to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n. o. v., without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a complete new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests." 5A Moore's Federal Practice § 50.08, at 2358-59 (1975). See also *Follette v. National Tea Co.*, 460 F. 2d 254, 255 (3rd Cir. 1972); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F. 2d 129, 132 (3rd Cir. 1965); *Massaro v. United States Lines Co.*, 307 F. 2d 299, 303 (3rd Cir. 1962); *Budge Manufacturing Co. v. United States*, 280 F. 2d 414, 415-16 (3rd Cir. 1960); *Landis v. Delp*, 327 F. Supp. 766, 768 (E. D. Pa. 1971); *Barlow v. Brunswick Corp.*, 311 F. Supp. 209, 217 (E. D. Pa. 1970).

Pepsi relies upon its request for charge as bridging the gap created by its failure to renew its directed verdict motion under Rule 50(b). Pepsi requested binding instructions, but it is clear that a request for such instructions, which the *district court* neither treated nor ruled upon as it would treat with or rule upon a motion for directed verdict, compare *Psinakis v. Psinakis*, 221 F. 2d 418, 422 (3rd Cir. 1955), will not be considered by this Court as satisfying the necessary predicate for a judgment N. O. V. [5] See, e.g., *Eisenberg v. Smith*, 263 F. 2d 827, 829 (3rd Cir. 1959), cert. denied, 360 U. S. 918 (1959); *Guglielmo v. Scotti & Sons, Inc.*, 58 F. R. D. 413, 416-17

5. We do not question the power of a district court to treat with a binding request for charge as though it was a motion for directed verdict. Where that situation occurs and the district court, *with the knowledge of all parties,* treats with and rules upon a binding request for charge as a motion for directed verdict, the necessary predicate for judgment N. O. V. has been provided. This, of course, was not the situation in the instant case.

(W. D. Pa. 1973); *Gilmore v. Lake Shore Motor Freight Co.*, 331 F. Supp. 1171, 1171-72 (W. D. Pa. 1971); *Dudding v. Thorpe*, 47 F. R. D. 565, 568 (W. D. Pa. 1969); *Wilson v. American Chain & Cable Co.*, 38 F. R. D. 72, 73 (E. D. Pa. 1965), rev'd on other grds., 364 F. 2d 558 (3rd Cir. 1966); *Brandon v. Yale & Towne Mfg. Co.*, 220 F. Supp. 855, 857 (E. D. Pa. 1963), aff'd on other grds., 342 F. 2d 519 (3rd Cir. 1965) (*en banc*). Cf., e.g., *Massaro, supra*, 307 F. 2d at 303.[6] This precedent makes clear that the constitutional and procedural concerns summarized by Moore are not allayed in this Circuit by a mere request for binding instruction.[7]

6. In *Massaro*, the request was made before the introduction of any evidence and was less specific than the request here. However, the same constitutional and cure considerations discussed *supra* are applicable here and in *Massaro*. Without the notice of evidentiary paucity, a court in its N. O. V. determination runs the risk of substituting itself for the trier of fact and of preventing the adverse party from employing evidentiary cure, if necessary.

In the welter of a long and complex trial such as this, the constitutional and cure concerns discussed *supra* demand careful scrutiny of the reasons for taking issues from the jury. This should be undertaken when *all* the evidence is before the court.

7. The cases relied on by Pepsi are not in this Circuit. One such is *Jack Cole Co. v. Hudson*, 409 F. 2d 188, 191 (5th Cir. 1969). There defendants moved for a directed verdict at the close of the plaintiff's evidence. The motion was not renewed at the close of all evidence. Defendants "did apparently make a request in chambers that the jury be instructed to find for them. This was refused, as was a similar request made in open court after the court's charge to the jury had been given.

"There can be no doubt that the trial judge was well aware of the reasons for the requested jury instruction, and, under the circumstances, we hold that this constitutes a sufficient predicate for the subsequent motion for judgment notwithstanding the verdict." (citation omitted). See also 9 Wright & Miller, Fed. Prac. & P. § 2537 n. 32 (Supp. 1975). While the dissent reads this recital as indicating that requests for charge were sought, we find the factual statement in *Cole* much less clear. We treat *Cole* as a case where the defendants requested a directed verdict. In any event, the district judge in *Cole* apparently treated the defendants' request as a motion for directed verdict, which would satisfy Rule 50(b). Such is not our case. In this Circuit we think the constitutional

The provisions of the rule are clear. The lock has a large visible keyhole and the key to turn the lock is as plainly described as we believe to be possible. The rule has been in effect for a very considerable length of time. We do not see any reason to obfuscate a plain rule by adding a gloss to it to aid those who, for reasons unknown to us, have not seen fit to follow it.

We note also that the learned District Judge has not made any disposition of the timely motions for new trial or to alter or amend the judgment.[8]

The judgment N. O. V. will be reversed and the case remanded with the direction to proceed in a manner consistent with this opinion.[9]

7. (Cont'd.)
and procedural issues are so important that we are unwilling to make the supposition that the bench and the adverse party have sufficient notice. See note 6 *supra*.

8. "Where the judgment n.o.v. is reversed, and the trial court has granted the motion for a new trial, the case will ordinarily be remanded to the trial court for a new trial in accordance with that court's action on the motion for a new trial. But the courts of appeals have authority to order 'otherwise'. This means, among other things, that the appellate court may reverse the grant of a new trial and order entry of judgment on the verdict. Or, it may remand the case to the trial court for that court to consider the motion for a new trial in light of the disposition by the court of appeals of the judgment n.o.v. *This latter practice has also developed where the trial court has failed to rule on a motion for new trial and the appellate court reverses the judgment n.o.v. But some courts have held that the motion for a new trial is abandoned if not pressed on the trial court after the grant of judgment n.o.v.*" (Notes omitted and emphasis supplied). 5A Moore's *supra* § 50.14, at 2382-83, 2383 n. 8, 9. "In *Mays v. Pioneer Lumber Corp.* [502 F. 2d 106 (4th Cir. 1974)], where trial court failed to rule on alternative motion for new trial court of appeals reversed judgment n.o.v. and remanded for reinstatement of the verdict without requiring trial court to decide the new trial motion."

9. We do not reach the other contentions raised by the parties. To the extent they are relevant, they may be raised on remand.

HUNTER, Cir. J., dissenting: I respectfully disagree with the majority's determination that the judgment N. O. V. should be reversed on the basis of Fed. R. Civ. P. 50(b). To me, the result represents an unnecessarily technical and rigid application of the rule, and does not serve the interests of justice or judicial efficiency.

I do not, of course, question the rule of *Beebe v. Highland Tank and Manufacturing Co.*, 373 F. 2d 886 (3rd Cir.), cert. denied *sub. nom. National Molasses Co. v. Beebe,* 388 U. S. 911 (1967), that, unless a defendant *renews* a motion for directed verdict first made at the end of plaintiff's case after all the evidence is in, the district court is without power to grant a subsequent motion by the defendant for judgment N. O. V. The narrow question presented here is whether, on the facts of this case, it could be concluded that the earlier motion *had* been renewed.

It is important to note that defendant here *did* make a motion for directed verdict at the end of plaintiff's case, and that this motion *was* formal, detailed and hotly contested. At the conclusion of all the evidence, while there was admittedly no "formal" renewal of the motion for directed verdict, defendant did submit "Requested Points for Charge" which began with the words

> 1. "You are directed to enter a verdict in favor of defendants."

Since this request can fairly be read as incorporating the specific grounds [1] set forth in the earlier motion, the only procedural "defect" which the majority can rely upon to find non-compliance with Rule 50(b) is the failure to set forth the quoted request on a separate piece of paper (or orally) and label it

> "(Renewal of) Motion for Directed Verdict"

1. Fed. R. Civ. P. 50(a) requires that a motion for directed verdict state the specific grounds therefor.

To me, this "defect" is of insufficient substance to justify a further delay in the consideration of the merits of this already protracted litigation. I would hold that there has been adequate compliance with Rule 50(b).

There is no decision of this court clearly resolving the issue of whether the court of appeals may find compliance with Rule 50(b) on the basis of (1) a motion for directed verdict after the plaintiff's case *and* (2) a request for binding jury instructions at the close of all the evidence, where the trial judge has not expressly treated the latter request as a renewal of the motion for directed verdict.[2] In *Beebe* there is no indication that the defendant, at the close of all the evidence, requested a binding instruction or took any other action which might have alerted the court and the plaintiff that the defendant was still contending that the case should not go to the jury. In *Eisenberg v. Smith*, 263 F. 2d 827 (3rd Cir.) cert. denied, 360 U. S. 918 (1959), there is no indication that there had been an *earlier* motion for directed verdict to which the request for binding instructions could relate; the latter request could therefore not serve as a basis for a judgment N. O. V. since specific grounds had not been set forth as required by Fed. R. Civ. P. 50(a). The other Third Circuit cases cited by the majority are distinguishable for similar reasons.

In *Jack Cole Co. v. Hudson*, 409 F. 2d 188 (5th Cir. 1969),[3] the court of appeals found sufficient compliance with Rule 50(b) on facts which I believe are indistinguishable from those now presented. The majority opinion (p. 6, n. 7) attempts to draw a distinction by "read[ing] *Cole* as a case where the defendants requested a directed vedict." That begs for question, since, from the reported opinion in *Cole*, we know only that defendants "did ap-

2. I do not read the majority opinion as taking the position that its result is required by any Third Circuit case on point.

3. See also, *Roberts v. Pierce*, 398 F. 2d 954 (5th Cir. 1968).

parently make a request in chambers [after the close of all the evidence] that the jury be instructed to find for them. This was refused. . . ." 409 F. 2d at 191. The same request and necessarily, the same refusal were made here. The majority also suggests that *Cole* is distinguishable because "the district judge in *Cole* apparently treated the defendants' request as a motion for directed verdict which would satisfy Rule 50(b)." Majority opinion, p. 6, n. 7. The *Cole* opinion provides no basis for such a conclusion as to the reason for the trial judge's action; to the extent that such an inference can be drawn from the fact that the district judge subsequently entertained a motion for judgment N. O. V., the inference is equally applicable in our case.

In the absence of contrary Third Circuit precedent, I would adopt *Jack Cole* and apply it to this case, since in my view of the district court proceedings, "[t]here can be no doubt that the trial judge was well aware of the reasons for the requested jury instruction, and, under the circumstances, . . . this constitutes a sufficient predicate for the subsequent motion for judgment notwithstanding the verdict." *Id.*, 409 F. 2d at 191.

As to the plaintiff's notice of the defendant's stance, three factors are persuasive. First, it would hardly have been reasonable for the plaintiff to assume that the defendant would inexplicably abandon its earlier vigorous contentions that the evidence was insufficient to make out a jury case.[4] Secondly, the points for jury charge not only included the general request for a directed verdict but also at least one specific point attacking the sufficiency of plaintiff's evidence which, if given, would have been tantamount

4. Plaintiff has not suggested that the defendants' witnesses "cured" the alleged deficiencies in plaintiff's case so as to explain such an abandonment.

to a directed verdict.[5] Finally, we have not been referred to any point during the sixteen-month period between defendant's motion for judgment N. O. V. and the granting of that motion when plaintiff even suggested that Rule 50(b) required a denial of the motion. Plaintiff did not raise this issue in its original or reply brief in this court.[6]

As to the trial judge's notice of defendant's renewal of the motion for directed verdict, we have one unambiguous passage in the record. During argument prior to the charge, counsel for plaintiff pressed for inclusion of a particular element of damages:

> [Counsel for Plaintiff]: . . .
>
> If the Court later decides that wasn't a proper element of damages, you can cut it out very easily.
>
> THE COURT: We still have N. O. V.

N. T. 18-115.

Even if I were not convinced by this record that plaintiff and the district court understood that defendant had preserved its objections to the sufficiency of the evidence, I could not join the majority. In *Psinakis v.*

5. Requested point for charge number 3:

> I direct you to find that [plaintiff] has not sustained its burden to prove by a preponderance of the evidence that either defendant or both conspired with each other or anyone else to violate the Sherman Act.

6. I do not mean to suggest that any doctrine of waiver could vitiate the rule in *Beebe*.

However, plaintiff's failure to object, prior to the raising of the Rule 50(b) issue by this court, to consideration of the merits of the motion for judgment N. O. V. does indicate that the concern voiced by the majority, (p. 4) that less-than-strict compliance with Rule 50(b) may result in surprise or a "trap" for the opposing party, is utterly groundless in this case.

Even in its supplemental brief on this issue, plaintiff has not suggested any way in which it was lulled, "trapped" or otherwise prejudiced by the procedural irregularity.

Psinakis, 221 F. 2d 418, 422 (3d Cir. 1955), this court held that where it could be determined from the record that the trial court had treated a "motion for binding instructions" as a motion for directed verdict, the appellate court "properly may consider these cases on the basis of the trial court's refusal to grant [defendant's] motion for judgment [N. O. V.]. . . ."[7] We thus recognized that *the trial judge*, may, on the basis of his greater familiarity with the proceedings, tolerate formal "defects" and find "substantial compliance" with Rule 50(b) where no prejudice would result.[8] The majority today purports to reaffirm *Psinakis* (majority opinion at p. 5, n. 5), but states that it is inapplicable to this case. It is, of course, true that the district judge did not state on the record that he considered the request(s) for charge to be tantamount to a renewal of the motion for directed verdict. However, because the district judge not only entertained but granted the motion for judgment N. O. V., there are only two possibilities: either the district judge found "substantial compliance" with Rule 50(b), as permitted under *Psinakis*, or he overlooked the ramifications of Rule 50(b). There is no way to tell. I am convinced that the district judge either did find or would have found "substantial compliance."[9] The majority opinion must be read not only as disagreeing with this position, but as holding that "substantial compliance" *could* not have been found by the district judge; otherwise the proper (less severe) "remedy" would be to remand for district court consideration of the "substantial compliance" issue. I find no basis on this record for a holding that the district court *could* not have found substantial compliance.

7. The published opinion does not indicate whether or not a formal, specific motion for directed verdict was made earlier.

8. Accord, *Huddell v. Levin*, 395 F. Supp. 64, 80 (D. N. J. 1975), rev'd on other grounds, 3d Cir. No. 75-1851/4, filed May 5, 1976.

9. In *Brandon v. Yale & Towne Mfg. Co.*, 342 F. 2d 519 (3d Cir. 1965) (en banc), Judge McLaughlin, dissenting, concluded that there had been sufficient compliance with Rule 50(b) even though the district judge had held to the contrary. (The latter also rejected the motion for judgment N. O. V. on the merits). The majority did not discuss the question, affirming instead on the sufficiency of the evidence.

> [T]he courts take a liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment.

9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2537 at 596-97 (1971) (collecting cases).

While I might agree that "[t]he Third Circuit's rulings on this procedural question are not entirely clear," *Huddell v. Levin*, 395 F. Supp. 64, 80 (D. N. J. 1975), (finding "substantial compliance" on comparable facts), rev'd on other grounds, 3d Cir. No. 75-1851/4, filed May 5, 1976, I also agree that "[a] review of these cases indicates not only the Third Circuit's desire that the trial judge be apprised of the movant's position through 'substantial compliance' with Rule 50 . . . but also an overriding concern that technical non-compliance with Rule 50 should not be used as a basis for withholding relief when warranted . . . ." *Id.* I would not break with that precedent.

> The court at every stage of the proceeding must disregard any error or defect which does not affect the substantial rights of the parties.

For the foregoing reasons, I would reach the merits of the motion for judgment N. O. V. However, since the majority disagrees and leaves open the possibility of a new trial, and thus perhaps a new appeal, I believe that it would be inappropriate to state my views on the merits.

APPENDIX B.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1628, 76-1040

INEZ V. LOWENSTEIN, Individually, and A. MOORE LIFTER, JEROME L. MARKOVITZ, SUSAN L. CHACE, JANE B. LOWENSTEIN and INEZ V. LOWENSTEIN, co-executors of the Estate of Emanuel D. Lowenstein, Successors in interest to BBCI, INC., Successor in interest to BOOTH BOTTLING CO., INC.,

Appellants

v.

PEPSI-COLA BOTTLING CO. OF PENNSAUKEN and CANADA DRY DELAWARE VALLEY BOTTLING COMPANY,

Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, BIGGS, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by PEPSI-COLA BOTTLING CO. OF PENNSAUKEN, Appellee in the above

entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Rosenn and Hunter would grant the petition for rehearing.

By THE COURT,

LEONARD I. GARTH

Judge

Dated: June 28, 1976

APPENDIX C.

Opinion and Order of the United States District Court for the Eastern District of Pennsylvania.

BBCI, INC., Successor in Interest to
Booth Bottling Co., Inc.

v.

CANADA DRY DELAWARE VALLEY BOTTLING CO.,
and Pepsi Cola Bottling Company of Pennsauken.

Civ. A. No. 70-1510.
United States District Court,
E. D. Pennsylvania.
April 28, 1975.

OPINION AND ORDER.

JOHN MORGAN DAVIS, *Senior District Judge.*

Defendant Pepsi Cola Bottling Company of Pennsauken ("Pepsi") seeks post-trial relief from a jury verdict against it based on both a contract claim and an antitrust claim. Canada Dry Delaware Valley Bottling Co. ("Canada Dry") was absolved of all liability by the jury, and is not involved in these post trial motions. Both claims against Pepsi relate to a sub-franchise agreement between Pepsi and Booth Bottling Co., Inc. ("Booth"). The breach of contract claim is based on the allegedly premature termination of this sub-franchise agreement. The antitrust claim is that the attempted repurchase and ultimate termination of the sub-franchise were among the "unfair means of competition" alleged by plaintiff, and that these were acts of unfair competition, and evidenced an anti-competitive intent. More specifically, it is the attempted repurchase from which plaintiff claims a jury may infer

that defendant, at the time it granted Booth the sub-franchise, harbored a secret intent to repurchase shortly thereafter, in order to destroy Booth's employee morale, its financial stability and its root beer as a competitive product.

In November, 1968, Pepsi was offered the Hires Root Beer franchise for Southern New Jersey, Southeastern Pennsylvania and Northern Delaware, provided it could find a means of distributing the product in Southeastern Pennsylvania and Northern Delaware, where it did not operate. Pepsi therefore offered a sub-franchise to Booth, to cover the Southeastern Pennsylvania and Northern Delaware territory.

Pepsi had previously made unsuccessful attempts to acquire the Metropolitan Pepsi-Cola bottling plant and franchise. Booth knew this; and in its negotiations with Pepsi over the terms of the sub-franchise, the question of what would happen if Pepsi *did* acquire such a Philadelphia facility of its own, was the subject of intense discussion both between the parties and internally at Booth. The end result was that the parties entered into a sub-franchise agreement which included not only the usual termination provisions, but also a contractual provision whereby Pepsi could repurchase the sub-franchise if it paid a stipulated price, even if none of the termination provisions applied. That provision stated the following:

5.

* * *

(d) If circumstances shall be such that at a particular time PENNSAUKEN is not entitled to terminate under subsections (b) and (c) of this section, PENNSAUKEN shall nevertheless have the right to repurchase (terminate) this subfranchise agreement by paying to BOOTH for BOOTH's good will and for the sub-

franchise a price computed by multiplying the number of standard cases of HIRES sold by BOOTH at its usual and regularly established prices during the twelve (12) month period immediately preceding the date of purchase by twenty-five cents ($.25) per case.
° ° °

The present point of contention is that Pepsi claimed that this allowed it to repurchase the sub-franchise at will, and Booth claimed that its permission was necessary.

The sub-franchise was entered into as of February 17, 1969. Booth began bottling and distributing Hires in March, 1969. In May or June of 1969 Canada Dry Corporation decided to sell its company owned Philadelphia plant to a franchisee and began negotiations with Harold Honickman, President of Pepsi. On September 30, 1969 that transaction was finalized and Canada Dry Delaware Valley was created by Harold Honickman. On November 17, 1969, Honickman offered to repurchase the Hires subfranchise from Booth for the contractually stipulated sum. Booth refused, was terminated and this litigation followed.

I. *Breach of Contract Claim.*

Under the breach of contract claim, the question we must decide is whether or not the Court was correct in submitting the interpretation of this subfranchise to the jury, and admitting parole evidence in this regard. If its provisions are ambiguous or obscure, then its interpretation becomes a question of fact for the jury, and parole evidence is admissible to aid in this interpretation. If its provisions are unambiguous and clear, then its interpretation becomes a question of law for the Judge, and parole evidence is not admissible. The question of whether its provisions are ambiguous or obscure on the one hand, or unambiguous and clear on the other hand, is a question of

law for the Judge. Haskins v. Point Towing Co., 421 F. 2d 532, 536 (3rd Cir. 1970); Ludwig Honold Mfg. Co. v. Fletcher, 405 F. 2d 1123 (3rd Cir. 1969); Jamison v. A. M. Byers Co., 330 F. 2d 657, 660 (3d Cir. 1964); Globe Motors, Inc. v. Studebaker-Packard Corp., 328 F. 2d 645, 649 (3d Cir. 1964); Magill v. Westinghouse Electric Corp., 327 F. Supp. 1097, 1107 (E. D. Pa. 1971), aff'd in part, rev'd in part (on other grounds), 464 F. 2d 294 (3d Cir. 1972); A. L. K. Corp. v. Columbia Picture Industries, Inc., 320 F. Supp. 816, 818 (E. D. Pa. 1970), rev'd on other grounds, 440 F. 2d 761 (3rd Cir. 1971); Sirianni v. General Motors Corp., 313 F. Supp. 1176, 1178 (W. D. Pa. 1970); Hall Motor Sales, Inc. v. Studebaker-Packard Corp., 145 F. Supp. 430 (W. D. Pa. 1956); Shipley v. Pittsburgh & L. E. R. Co., 83 F. Supp. 722, 741 (W. D. Pa. 1949); Consolidated Tile & Slate Co. v. Fox, 410 Pa. 336, 189 A. 2d 228 (1963); Easton v. Washington County Ins. Co., 391 Pa. 28, 137 A. 2d 332 (1957); Foulke v. Miller, 381 Pa. 587, 112 A. 2d 124 (1955); Waldman v. Shoemaker, 367 Pa. 587, 80 A. 2d 776 (1951); 12A. P. S. § 2-202 (U. C. C. § 2-202); Corbin on Contracts § 535; Notes of Testimony 3/59-60.

At trial, this Court decided that the terms of the subfranchise were ambiguous or unclear, and submitted the contract to the jury, and admitted parole evidence to aid in its interpretation. Now that the heat of trial has subsided, we must re-examine the terms of the subfranchise in the more dispassionate, reflective circumstances afforded us by defendant's post trial motions.

The contract between Pepsi and Booth contains the following provisions:

3. *Master Franchise Provisions Applicable.*

(a) ° ° ° this subfranchise agreement is subject to the terms and conditions provided for by the

printed provisions of each of the MASTER FRANCHISE AGREEMENTS attached hereto as Exhibits "C" and "D" in like manner as if such provisions were an integral part hereof and the names of the parties hereto were substituted for those of the parties to said MASTER FRANCHISE AGREEMENTS. Under no circumstances shall BOOTH's rights hereunder within its subterritories exceed those of PENNSAUKEN under each of the MASTER FRANCHISE AGREEMENTS as they now exist or from time to time may hereafter be amended.

5. *Sales Quota.*

* * *

(d) If circumstances shall be such that at a particular time PENNSAUKEN is not entitled to terminate under subsections (b) and (c) of this section, PENNSAUKEN shall nevertheless have the right to repurchase (terminate) this subfranchise agreement by paying to BOOTH for BOOTH's good will and for the subfranchise a price computed by multiplying the number of standard cases of HIRES sold by BOOTH at its usual and regularly established prices during the twelve (12) month period immediately preceding the date of purchase by twenty-five cents ($.25) per case.

* * *

The relevant section of the Crush master franchise is:

ARTICLE VI

TERMINATION OF FRANCHISE

* * *

2. Termination With Notice. In the event of any of the following:

a. The failure of BOTTLER to manufacture, bottle and sell CRUSH for any reason whatsoever for a period of 15 consecutive days except as provided in Paragraph 1 of Article IV hereof;

b. The failure of BOTTLER to manufacture, bottle and sell CRUSH within 30 days after the date hereof; then in either such event COMPANY may terminate FRANCHISE by giving written notice to BOTTLER that FRANCHISE is terminated upon date of such notice.

Pepsi argues that it had two independent justifications for terminating the contract with Booth (1) failure of Booth to sell Orange Crush, and (2) the repurchase provision in paragraph 5(d).

The Pepsi-Booth contract was dated February 17, 1969. From the date of the contract through the date of termination—a period of more than 300 days—Booth had never sold Crush. Defendant argues that this would be grounds for termination under paragraph 2 above of the master franchise agreement, which was incorporated by reference into the subfranchise agreement by paragraph 3(a) above. The plaintiff counters this argument with three contentions of his own: (a) this argument was specifically repudiated by defense counsel himself, in his closing argument (N. T. 19/107-108); (b) Pepsi itself was not distributing Crush either, and Booth was not expected to begin distribution until *after* Pepsi had done so; and (c) no damages were awarded for the termination of the Orange Crush franchise, only the *Hires* franchise, which defendant admitted was terminated despite Booth's satisfactory performance.

However, we need not decide whether or not Pepsi was justified in terminating the contract for failure to sell Crush, since we find that Pepsi was justified in terminating the contract under paragraph 5(d).

During the ten month period of its bottling, Booth had sold 216,000 cases of Hires. At the rate of 25 cents per case, Pepsi would have owed Booth $54,000 under this contract provision. When Honickman offered to terminate Booth, he did so on the basis that he would pay $75,000, which was 25 cents times the 300,000 cases contemplated in other sections of the agreement. Booth refused the offer. Pepsi then sent termination notice to Booth.

Plaintiff first argues that the repurchase provision did not allow this purchase, or at least was ambiguous on the point, because the phrase therein—"during the twelve month period immediately preceding the date of purchase" —itself provided a one year minimum term, and only ten months had expired. However, it is clear from the entire provision that this part of the provision refers to the number of standard cases sold during the preceding twelve months, whether or not the contract was in force, and not to the term of the contract as being at least twelve months.

Plaintiff's second argument is that the repurchase provision, as all other provisions in the subfranchise, was specifically made subject to the terms of the master franchise by paragraph 3(a) above, which incorporated them by reference. Thus the subfranchise incorporated the provisions of the master franchise regarding termination. These provisions are found in Article VI, of which paragraph 2 was already reproduced above. In summary, Article VI provided for termination:

> 1. Without notice—in the event of the bottler's death, insanity, insolvency, cessation of business, or attempt to transfer the franchise without the national company's consent.
>
> 2. With notice—if the bottler failed to manufacture, bottle, and sell the product for any reason.

> 3. Within two years, with notice—by either party, if the other failed to perform and did not act to correct such failure within seven days of receiving notice thereof.
>
> 4. After two years—by either party, with 30 days notice.

Originally, this paragraph 4 of Article VI provided for termination without cause, but the words "without cause" were specifically eliminated at Pepsi's request before the master franchise was signed.

From these provisions, plaintiff somehow reads into paragraph 5(d) a requirement that Booth's permission was necessary in order to have a repurchase. The defendant relies on the explicit language of paragraph 5(d) which gives Pepsi a "right to repurchase", and makes no mention of Booth's consent or permission.

To understand how plaintiff reads into paragraph 5(d) a requirement of permission, we must examine its argument step by step. The first step is that because the terms of the subfranchise are "subject to" the terms of the master franchise, then the terms of the subfranchise are "controlled by" the terms of the master franchise. However, it is clear that being "subject to" the master franchise means nothing more than being incorporated by reference. All the terms stand on an equal footing, and neither set of terms supersedes the other.

The second step in the argument is that the terms of the master franchise are inconsistent with the terms of the subfranchise, and hence the terms of the master franchise "control" the terms of the subfranchise, as above, or at the least the inconsistency creates an ambiguity for a jury to resolve. But in fact there is no inconsistency between the master franchise and the subfranchise. The

fact that these termination provisions are different does not make them inconsistent, only alternative. In other words, they are not to be read as being conjunctive (connected by "and"), but as disjunctive (connected by an "or"). In short, paragraph 5(d) provides a fifth mode of termination in addition to the other four enunciated in Article VI. It is an addition, not an alteration or contradiction, and as such is perfectly consistent.

There are four important reasons why the contract must be read in this way. Firstly, it is the reading which gives full meaning to all the provisions, and contracts *should* be read to eliminate ambiguity and inconsistency. Secondly, by giving a "right to repurchase", paragraph 5(d) necessarily implied that no permission was needed. Black's Law Dictionary defines a "right" as a "power, privilege, faculty, or demand", and further as "a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others." Thirdly, there is no term specified for the contract,* and it could happen that none of the termination provisions of Article VI would apply (note that the words "without cause" were specifically eliminated from paragraph 4 of Article VI). Thus, if paragraph 5(d) required Booth's permission to repurchase the subfranchise, Pepsi might never be able to get out of the contract. It is not reasonable that Pepsi would have bound itself with such a provision. Rather, it would have taken precautions to insure that if its relationship with Booth didn't work out, it could buy its way out of the contract without Booth's permission. Fourthly, if paragraph 5(d) required Booth's permission, then Booth could withhold such permission as a negotiating tactic, and the formula of 25 cents per case would be meaningless; Booth could always force a renegotiation of the price.

* See Article II, paragraph 1, of the subfranchise.

In summary, there is no inconsistency between paragraph 5(d) dealing with *termination by repurchase*, and the several provisions in the subfranchise and the master franchise dealing with *termination for cause*. Therefore we cannot accept plaintiff's argument that an inconsistency made paragraph 5(d) ambiguous. In fact, we conclude that paragraph 5(d) clearly allowed Pepsi to repurchase the contract without Booth's permission. Therefore, we reluctantly conclude that it was error to submit the interpretation of these contracts to the jury, and to admit parole evidence to aid in this interpretation. We further conclude as a matter of law that Pepsi acted within its rights and did not breach the contract. Accordingly, we grant Judgment n. o. v. to Pepsi on the breach of contract claim.

II. *Antitrust Claim.*

It is clear that the breach of contract verdict against Pepsi tainted the antitrust verdict. As stated above, the court should have entered a judgment in favor of Pepsi as a matter of law, since Pepsi did nothing more than follow the carefully negotiated repurchase provision, which Booth chose to ignore. But by allowing the jury to conclude that the repurchase provision did *not* permit Pepsi to repurchase without Booth's permission, the jury was wrongly allowed to reason that Pepsi's "violation" of the contract was itself an act of unfair competition evidencing an anti-competitive intent. Furthermore, if, as a matter of law, there was a right to repurchase, then Pepsi's and Hires' refusal to sell Hires' concentrate to Booth after January 1, 1969 could not evidence a concerted refusal to sell in violation of Sherman I, for if Booth was no longer a subfranchisee then it obviously had no right to purchase Hires' concentrate and Pepsi had no right to sell it to them.

For these reasons, we can reject plaintiff's contentions that the termination of the subfranchise agreement, and that the concerted refusal to deal were acts of unfair competition. We turn now to the other alleged acts of unfair competition.

The next two acts cited by plaintiff as evidence of Pepsi's alleged violation of the antitrust laws are the planting of an employee, and employee theft. The Vice-President of Pepsi recommended that Booth hire Thomas Pringle, which Booth did, for a chain store merchandising position. After ten weeks at Booth, Pringle was rehired by Canada Dry of Delaware Valley, the other defendant in this case. Similarly, there was evidence that Marvin Cohn, a key employee of Booth, was "stolen" to work at Canada Dry. However, since both employees were hired by Canada Dry, which the jury absolved of all liability in this case, we can reject plaintiff's contentions that these were found to be acts of unfair competition by the jury.

Booth next argues that resale price maintenance was used to force it to sell at low prices, much to its economic harm. However, this claim was not against Pepsi, but against Beverages, Inc., with whom it settled. Similarly, Booth argues that it was the victim of discriminatory treatment in the policies governing the sale of competitive products. It claims that it was not allowed to sell its own brand of Root Beer in competition with Hires, whereas Canada Dry was. It is clear that the national companies, Beverages, Inc., and Crush International, were policing the sales of Booth, while Beverages and Pepsi were policing the sales of Canada Dry. However, the only common actor in the two policing actions above is Beverages, with whom Booth settled. The only company to benefit from the alleged discrimination was Canada Dry, which the jury held not liable. Furthermore, there was clear evidence that the total lost profits from Booth's inability to sell its own Root Beer was far exceeded by the total profits it made from its right to sell Hires (N. T. 4/63-66).

Booth next claims Pepsi forced it to engage in considerable promotional activity to promote Hires, and then took away the franchise and gave it to Canada Dry. The argument is that Booth paid the cost and Canada Dry reaped the profits of this promotional activity. However, the evidence indicated that Booth made a substantial profit as a result of the promotion of Hires (N. T. 2/105-106, 4/45-60, 5/5, 6/15). Equally insubstantial is Booth's claim that Pepsi is liable for the alleged use of interlocking directorates to demand payment of a $90,000.00 debt. Zuckerman-Honickman was Booth's chief supplier of glass, and ceased dealing with Booth on credit, demanding payment of the $90,000.00 worth of accounts. Despite the claims of interlocking directorates, Zuckerman-Honickman is a separate corporation which was not a party to the trial, and it is distinct from Pepsi. Furthermore, the evidence indicated that the accounts receivable grew from $20,000.00 to $90,000.00 in the preceding nine months (N. T. 16/58), and that this was not Zuckerman-Honickman's first attempt to collect it, (Exhibit D-40).

Booth's final argument is that Honickman, sued by Booth in New Jersey, took an affidavit that Booth's unsatisfactory sales promotion necessitated termination of the subfranchise. However, such an affidavit occurred after the termination, and hence cannot be an anti-competitive act with respect to Booth. At most it could merely be defamatory. However, statements made in the course of a judicial proceeding are absolutely privileged and hence cannot even give rise to an action for defamation. *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 514, 235 A. 2d 576 (1967).

For these reasons, it is clear that there was no evidence from which the jury could have found that Pepsi was liable to Booth on the antitrust claim. Accordingly, we grant Judgment n. o. v. to Pepsi on the antitrust claim.

III. *Conclusion.*

In Part I we granted Judgment n. o. v. on the breach of contract claim, and in Part II we granted Judgment n. o. v. on the antitrust claim. Thus we find that Pepsi should not have been held liable to Booth at all. Accordingly, we need not resolve the issues concerning the measure of damages.

Supreme Court, U. S.
FILED
OCT 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-437

PEPSI COLA BOTTLING CO. OF PENNSAUKEN,
Petitioner,

v.

INEZ V. LOWENSTEIN, Individually, and A. MOORE LIFTER, JEROME L. MARKOVITZ, SUSAN L. CHACE, JANE B. LOWENSTEIN and INEZ V. LOWENSTEIN, Co-Executors of the Estate of EMMANUEL D. LOWENSTEIN, Successors in Interest to BBCI, INC., Successor in Interest to BOOTH BOTTLING CO., INC.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINION BELOW.

The opinion of the Court of Appeals is officially reported at 536 F. 2d 9 (3d Cir. 1976).

QUESTION PRESENTED.

Does a request for binding instructions provide the proper procedural predicate for judgment n.o.v. under Fed. R. Civ. P. 50(b), where defendant failed to renew its motion for directed verdict at the conclusion of all the evidence and where neither the Court nor the parties treated the request for binding instructions as the equivalent of a motion for directed verdict?

STATEMENT OF THE CASE.

Following a jury verdict in favor of the respondents in the amount of $1,414,750., petitioner filed various post-trial motions. The trial court granted petitioner's motion for judgment n.o.v. No rulings on petitioner's motion for a new trial, or its motion to alter and amend judgment, were sought or obtained at that time. Respondents appealed. The judgment n.o.v. was reversed by the Third Circuit on the grounds discussed below, and the matter was remanded for consideration of the unresolved motions in light of the Third Circuit opinion.

The Third Circuit, calling attention to its earlier decision in *Beebe v. Highland Tank and Manufacturing Company*, 373 F. 2d 886 (3d Cir.), *cert. denied* sub nom., *National Molasses Co. v. Beebe, Administrator*, 388 U. S. 911 (1967), held that a proper procedural predicate had not existed for judgment n.o.v. in view of the petitioner's admitted failure to move for a directed verdict at the close of all the evidence (536 F. 2d at 10). The Third Circuit recognized that where the trial court and the parties treat a request for binding instructions as a renewal of the motion for directed verdict, the request will constitute the requisite procedural predicate. There was nothing in the record of this action, however, to indicate that the trial judge or the parties considered the requests as a renewal of the motion for directed verdict (536 F. 2d at 11 n. 5). The judgment n.o.v. was accordingly reversed.

REASONS WHY CERTIORARI SHOULD BE DENIED.

As the sole basis for issuance of the writ, petitioner contends that the holding of the Third Circuit in this case conflicts with decisions in the Fifth and Seventh Circuits. An analysis of the cases indicates that no such conflict exists.

Rule 50(b) requires that a motion for directed verdict be made after presentation of all the evidence as a prerequisite to a later motion for judgment n.o.v. The rule has been cited as a prophylactic against violations of the Seventh Amendment. *Mutual Ben. Health & Accident Ass'n. v. Thomas*, 123 F. 2d 353, 355 (8th Cir. 1941). Moreover the requirement of a motion for directed verdict, as a condition precedent to a motion for judgment n.o.v., is a guarantee that the party against whom the motion is directed will have an opportunity at trial to cure any defects in proof; thus, the motion for judgment n.o.v. cannot be used as a trap at the conclusion of the trial. 5A MOORE'S FEDERAL PRACTICE, Section 50.08, at 2358-59 (1975).

The Federal courts have uniformly enforced this requirement, in holding that a motion for judgment n.o.v. may not be considered in the absence of a motion for directed verdict at trial. See, *e.g.*, *Continental Air Lines, Inc. v. Wagner-Morehouse, Inc.*, 401 F. 2d 23, 27 (7th Cir. 1968) (the Court of Appeals reversed judgment n.o.v. for plaintiff on the principal cause of action, though plaintiff had moved for directed verdict on defendant's counterclaim); *Guerrero v. American-Hawaiian Steamship Co.*, 222 F. 2d 238, 244 (9th Cir. 1955); *Southeastern Greyhound Lines v. McCafferty*, 169 F. 2d 1, 3 (6th Cir.), *cert. denied*, 335 U. S. 861 (1948). Several recent decisions have enforced the requirement, and denied judgment n.o.v., even where the undisputed evidence at trial clearly

supported judgment n.o.v. See *Rawls v. Daughters of Charity of Saint Vincent DePaul, Inc.*, 491 F. 2d 141, 147 (5th Cir.), *cert. denied*, 419 U. S. 1032 (1974); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F. 2d 814, 816-17 (2d Cir. 1970). The Circuits agree that Rule 50(b) is not satisfied by defendant's motion for directed verdict at the close of plaintiff's case, but that such motion must be renewed at the close of all the evidence. See, *e.g.*, *Gillentine v. McKeand*, 426 F. 2d 717, 722-23 (1st Cir. 1970); *Beebe v. Highland Tank and Manufacturing Co., supra*, 373 F. 2d at 888 (3d Cir. 1967); *Godwin v. Brown*, 249 F. 2d 356, 362-63 (8th Cir. 1957). It is to be noted from the above cases that the Fifth and Seventh Circuits, cited by petitioner as in conflict with the Third, have been in the forefront of strict enforcement of Rule 50(b).

Petitioner has argued that *certiorari* is appropriate since the Fifth and Seventh Circuits recognize an exception to the above rule which the Third Circuit should have applied in this case; petitioner has failed to mention that this exception was *pioneered* by the Third Circuit.

In *Psinakis v. Psinakis*, 221 F. 2d 418 (3d Cir. 1955), the Court of Appeals held that the procedural predicate for a motion for judgment n.o.v. may be supplied by a request for binding instructions, *where such request was treated in the trial court as a motion for directed verdict.* 221 F. 2d at 422. This principle was re-stated by the Court of Appeals in the present case. 536 F. 2d at 11 n. 5. In arguing there is diversity among the Circuits, petitioner has only cited several examples of the application of this same principle, by the Fifth and Seventh Circuits, to factual circumstances different from those in the present case.

Thus in *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F. 2d 572 (7th Cir. 1976) (on which petitioner relies) the Seventh Circuit empha-

sized the trial court's response to the requested instruction submitted by defense counsel, Mr. Mix:

> "'THE COURT: . . . *This is in effect a directed verdict*, Mr. Mix, Defendant's No. 1.
>
> MR. BOUNDAS: [Plaintiff's Counsel]: And we object to that, Your Honor.
>
> MR. MIX: I think we are entitled to it, Your Honor.
>
> THE COURT: If we are going to the jury at all, I don't think it is proper to give them *a pre-emptory instruction that is in effect a directed verdict.*'" 532 F. 2d at 577 (emphasis added).

The Seventh Circuit based its holding, that sufficient predicate for judgment n.o.v. had been laid, upon its finding from the record that

> "At the time of this conference it is apparent that all of the participants recognized that [defendant's] proposed instruction was, in effect, a motion for directed verdict." 532 F. 2d at 577.

In reaching its conclusion, the Seventh Circuit might as well have been applying the standard stated by the Third Circuit in this case:

> "Where . . . the district court, *with the knowledge of all parties*, treats with and rules upon a binding request for charge as a motion for directed verdict, the necessary predicate for judgment n.o.v. has been provided." 536 F. 2d at 11 n. 5.

The rationale for the Fifth Circuit's conclusion in *Jack Cole Co. v. Hudson*, 409 F. 2d 188 (5th Cir. 1969) is not clearly stated in the brief discussion devoted to the

point in the Court's opinion. 409 F. 2d at 191. However, that rationale may be deduced from that Court's stated reliance on *Roberts v. Pierce*, 398 F. 2d 954 (5th Cir. 1968), which clearly rested on the trial court's treatment of the requested instructions as a renewed motion for directed verdict. 398 F. 2d at 955-56. In view of this, the Court of Appeals in the present case had every reason to conclude, after stating that ". . . we find the factual statements in *Cole* much less clear," that ". . . the district judge in *Cole* apparently treated the defendants' request as a motion for directed verdict, which would satisfy Rule 50(b)." 536 F. 2d at 12 n. 7.

Psinakis, Pittsburgh, and apparently *Cole* all applied the same test. The Third Circuit, recognizing the exception, looked for but did not find any factual basis for its application here. The Third Circuit said:

> "Pepsi [petitioner] requested binding instructions, but it is clear that a request for such instructions, which the District Court neither treated nor ruled upon as it would treat with or rule upon a motion for directed verdict, compare *Psinakis v. Psinakis*, 221 F. 2d 418, 422 (3rd Cir. 1955), will not be considered by this Court as satisfying the necessary predicate for a judgment n.o.v." 536 F. 2d at 11.

The records of *Jack Cole* and *Pittsburgh* are marked by a second important factor which is completely absent from the instant case: statements by the trial court at the close of plaintiff's case clearly indicating the futility of any renewed motion for directed verdict at the close of all of the evidence. In *Jack Cole,* the Fifth Circuit cited from the record the trial judge's statement, that the testimony of plaintiff and of the traffic claim superintendent were sufficient to take the case to the jury. 409 F. 2d at 191 n. 1.

The Seventh Circuit in *Pittsburgh* applied the same test to the record and reached the same conclusion:

> "It appears obvious to us, and it must have appeared equally so to counsel for Brookhaven, that the court had firmly taken the position, notwithstanding any leaning which the judge may have had, that the jury was going to have the first opportunity to decide the case. Renewing the motion or moving for directed verdict on the counterclaim which hinged upon the validity of Brookhaven's defense, would have been nothing more than ritualistic mouthing and nugacious obeisance to the form, but not the spirit, of the Rule." 532 F. 2d at 577.

In no way did the trial judge in the present case suggest that his initial ruling on defendant's motion would render useless a renewal of that motion at the close of all the evidence. Instead, he reminded defense counsel that the motion could be renewed and would receive his serious consideration after all the evidence had been presented.

> "THE COURT: Mr. Mann I will overrule your motion and grant you an exception, of course, and the privilege of renewing the motion in reference to a judgment n.o.v., but I think *at this point* I feel that we should proceed further.
>
> MR. MANN: All right, Your Honor. I will file the formal motions in the morning.
>
> THE COURT: Naturally, and I will deny it formally in the morning, but I thought it would be best for you to know it now so that you could proceed in the morning. Thank you gentlemen. It has been a very interesting argument, and it does raise problems that I shall give *great consideration* to."
>
> **R. 13-118.**

Inasmuch as the Third Circuit in *Psinakis* and in the present case recognized the exception to the requirement of Rule 50(b) found in *Pittsburgh* and *Jack Cole*, it is apparent that there is no conflict among the Circuits. The result reached in this case turned on the absence of any facts in the record which would indicate that the trial court or the parties treated the request for binding instructions as a renewal of the motion for directed verdict, not on the application of a rule of law different from that in other circuits.

CONCLUSION.

For the reasons stated above, a writ of *certiorari* should not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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